# No. 11,628

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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EDWARD MILLER,

*Appellant,*

vs.

BANK OF AMERICA, N. T. & S. A., UNITED STATES OF AMERICA and GEORGE C. WELDEN, an individual doing business as Wholesalers Adjustment Bureau of San Francisco,

*Appellees.*

**On Appeal from the District Court of the United States for the Northern District of California, Southern Division.**

## BRIEF FOR THE UNITED STATES.

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*Appellees.*

**On Appeal from the District Court of the United States for the Northern District of California, Southern Division.**

## BRIEF FOR THE UNITED STATES.

### OPINION BELOW.

The memorandum decision and the findings of fact and conclusions of law of the District Court (R. 8-18) are unreported.

### JURISDICTION.

This is an appeal by Edward Miller from a decree (R. 19-21) of the District Court in an action of interpleader and for declaratory relief brought by the

Bank of America, National Trust and Savings Association, plaintiff, against the United States of America and others as conflicting claimants to a fund of $3,199.59 on deposit with the Bank in the Healdsburg Branch, located at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett. (R. 10.)

On September 7, 1944, by order of the District Court, the fund was deposited with the Clerk of the Court to abide the result of the action. (R. 10.)

On October 15, 1945, on motion of the Bank, default of the defendants Lyle B. Everett and Joseph L. McEachern was granted for failure to file answers. (R. 10.)

On motion of the Bank for an interlocutory decree of dismissal it was dismissed from the action leaving pending a motion for an order allowing its attorneys' fees and costs. (R. 10.)

On July 15, 1946, the case was tried to the Court sitting without a jury (R. 9) on a stipulation and amended stipulation of facts (R. 2-8).

The United States was a necessary party defendant on account of tax liens and notices of liens filed of record, according to law, with the County Recorder for Sonoma County, California, for unpaid withholding and social security taxes in the principal sum of $3,281.95 plus interest and penalties (R. 12-13), pursuant to the provisions of Sections 3670, 3671 and 3672 of the Internal Revenue Code.

By decree filed April 3, 1947 (R. 19-21), the District Court awarded the Bank $200 attorneys' fees and its

costs to be taxed and to the United States the remainder of the fund of $3,199.59. On May 5, 1947, within three months, a notice of appeal was filed by Edward Miller. (R. 21-22.)

The jurisdiction of the District Court was invoked under Section 24, Fifth and Twentieth, of the Judicial Code, as amended. This Court has jurisdiction upon appeal to review a final decision of the District Court under the provisions of Section 128 (a) of the Judicial Code, as amended.

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## QUESTION PRESENTED.

Did the District Court err in holding that the lien of the United States for taxes, which was perfected prior to any lien or levy by execution on personal property by a judgment creditor but after entry of judgment, took priority and was superior?

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## STATUTE INVOLVED.

Internal Revenue Code:

SUBCHAPTER B—LIEN FOR TAXES.

Sec. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon

all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1940 ed., Sec. 3670.)

Sec. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1940 ed., Sec. 3671.)

Sec. 3672 [as amended by Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; * * *.

(26 U.S.C. 1940 ed., Sec. 3672.)

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**STATEMENT.**

The facts as stipulated (R. 2-8) and as found by the District Court (R. 10-14) may be summarized as follows:

This is an action of interpleader brought by the Bank of America, National Trust and Savings Association (hereafter referred to as the Bank), against conflicting claimants to a fund of $3,199.59 on deposit in the Healdsburg Branch of the Bank located at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett. The fund remained in the Bank until September 7, 1944, when, by order of the Court, it was deposited with the Clerk of the District Court to abide the result of the action. (R. 10.)

On October 15, 1945, on motion of the Bank, default of the defendants Lyle B. Everett and Joseph B. McEachern was granted for failure to file answers. (R. 10.) On motion of the Bank for an interlocutory decree of dismissal it was dismissed from the action leaving pending a motion for an order allowing its attorneys' fees and costs. (R. 10.)

The claim of Edward Miller[1] arises out of an action instituted against Everett and McEachern Lumber Company, a copartnership composed of Lyle B. Everett

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[1]Edward Miller alone appeals from the judgment below. Defendant George C. Welden has not filed an appeal. The facts relating to his claim are set out (R. 11) and the District Court's conclusions of law are set out (R. 16-17). Further reference to the claim of Welden will be omitted herein other than to point out that a writ of attachment dated November 19, 1943, was served on the Bank November 22, 1943, issued out of the Superior Court in and for the City and County of San Francisco, California. On April 20, 1944, the court rendered judgment for $2,052.58. On April 21, 1944, the judgment was entered in the judgment book of the Superior Court in and for the City and County of San Francisco. The entry was not shown to have been prior to the notice and filing of tax liens by the United States at 10 and 11 minutes past 11:00 A.M. on April 21, 1944, with the County Recorder of Sonoma County, California. On April 25, 1944, a writ of execution, issuing under the judgment, was served on the Bank.

and Joseph L. McEachern, in the Superior Court for the County of Mendocino, State of California. On January 5, 1944, a writ of attachment for $8,212.52 was issued and served upon the Bank. On March 11, 1944, a judgment by default was entered in the amount of $5,052.43, plus attorneys' fees and interest and costs. On March 11, 1944, the judgment was entered on the book of judgments in the office of the County Clerk of Mendocino County, California. (R. 11-12.)

The claim of the United States is based upon $2,520.75 for withholding tax, interest and penalties due the United States from Lyle B. Everett and Joseph L. McEachern which tax was duly assessed by the Commissioner of Internal Revenue on March 25, 1944. On March 27, 1944, the Commissioner's assessment list was received by the Collector of Internal Revenue for the First Collection District of California. On April 3, 1944, notice and demand for payment was made on the taxpayers and a warrant of distraint was issued by the Collector. On April 21, 1944, at 11 minutes past 11:00 A.M., a notice of tax lien for the tax, interest and penalties in the total amount of $2,620.51 was filed of record with the County Recorder of Sonoma County, California. (R. 12-13.)

The claim of the United States is also based upon $629.85 for social security tax and interest and penalties due the United States from Lyle B. Everett and Joseph L. McEachern which tax was duly assessed by the Commissioner of Internal Revenue on April 11, 1944. On April 14, 1944, the Commissioner's as-

sessment list was received by the Collector of Internal Revenue for the First Collection District of California. On April 17, 1944, notice and demand for payment was made on the taxpayers and on April 21, 1944, at 10 minutes past 11:00 A.M., a notice of tax lien for the tax, interest and penalties in the amount of $661.34 was filed of record with the County Recorder of Sonoma County, California. (R. 13.)

The total amount due the United States from the taxpayers on account of the taxes assessed and notices filed is $3,281.95 with interest from April 21, 1944, as provided by law, no part of which has been paid and the whole remains due and owing to the United States. (R. 13.)

On April 21, 1944, the Collector of Internal Revenue for the First District of California served a notice of levy for the taxes upon the Bank at its Healdsburg Branch at Healdsburg, Sonoma County, California. (R. 13.)

The District Court found that the reasonable value of attorneys' fees incurred by the Bank was $200. (R. 14.)

The District Court made the following conclusions of law:

Lyle B. Everett and Joseph L. McEachern, since April 21, 1944, were indebted to the United States in the total amount of $3,281.95 with interest from that date as provided by law. (R. 14.)

A lien in favor of the United States arose March 27, 1944, when the Collector received the Commis-

sioner's assessment list of March 25, 1944, carrying an assessment of $2,520.75 withholding tax, interest and penalties, which lien attached to all of the property and rights to property belonging to Lyle B. Everett and Joseph B. McEachern, and particularly to the sum of $3,199.59, belonging to Lyle B. Everett and on deposit to his credit in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 15.)

A lien in favor of the United States arose on April 14, 1944, when the Collector received the Commissioner's assessment list of April 11, 1944, carrying an assessment of $629.85 social security tax, interest and penalties, which lien attached to all of the property and rights to property belonging to Lyle B. Everett and Joseph L. McEachern, and particularly to the sum of $3,199.59 belonging to Lyle B. Everett and on deposit to his credit in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 15-16.)

On April 21, 1944, the liens of the United States upon the sum of $3,199.59 were rendered valid when the Collector filed notices of lien in the office of the County Recorder of Sonoma County, California, and served notice of levy upon the Bank at its Healdsburg Branch in Healdsburg, Sonoma County, California. (R. 16.)

Lyle B. Everett and Joseph L. McEachern were indebted to Edward Miller in the sum of $5,052.43, plus attorneys' fees, interest and costs from March 11,

1944, because of a default judgment entered against them, but neither the indebtedness nor the judgment constituted, as of April 21, 1944, a lien upon the sum of $3,199.59 on deposit to the credit of Lyle B. Everett in the Bank at Healdsburg, Sonoma County, California, and then on deposit with the Clerk of the District Court. (R. 17.)

The tax liens of the United States were superior to the rights, claims and liens of the creditor defendants in and to the sum of $3,199.59, because recorded in Sonoma County, California, prior to the effectuation of any judgment liens in the County by any of the defendants. (R. 17-18.)

The Court directed that the sum of $200 attorneys' fees plus costs to be taxed be paid to the Bank and the remainder to the United States of America to be applied upon withholding and social security taxes due it (R. 18), and on April 3, 1947, entered a decree accordingly (R. 19-21). Edward Miller appeals. (R. 21-22.)

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## SUMMARY OF ARGUMENT.

Under Section 3670 of the Internal Revenue Code, if any person liable to pay any tax refuses to pay the same after demand the amount, including interest and penalties, shall be a lien in favor of the United States upon all property and rights to property belonging to such person, and under Section 3671 of the Internal Revenue Code, the lien arises at the time the assessment list is received by the Collector.

Under Section 3672 of the Internal Revenue Code, as amended, the lien becomes valid as against any judgment creditor when notice is filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated. The laws of California provide that notices of lien for internal revenue taxes payable to the United States be filed in the office of the county recorder of the county in which the property subject to the lien is situated.

In this case, therefore, the United States properly recorded its liens of record in Sonoma County. The burden was then on the creditor to establish a prior lien on the fund as such and the mere fact that a judgment has been entered is not, in and of itself, the establishment of a lien on personal property. Nor does an attachment, in and of itself, create a lien or establish a priority.

Under Section 674 (formerly Section 671) of the California Code of Civil Procedure, a judgment becomes a lien only upon the real property owned by the judgment debtor from the time it is docketed in the county where the property is situated.

In the case of an attachment on real property, the lien merges in the lien of the judgment. But under California law a judgment does not become a lien upon personal property even though the property is held by attachment in the action.

The decided cases establish two fundamental principles: First, that to perfect a lien on personal prop-

erty there must be a recording in the county where the property is situated; and second, that, under a judgment, there must be an execution upon personal property prior to the perfection of a lien by the United States. The judgment must be recorded in the county where the personal property is situated.

There was no intention on the part of Congress in enacting Section 3672 of the Internal Revenue Code, as amended, to give priority to anyone who merely obtained a judgment somewhere in the United States. In the case of personal property the lien of the United States recorded in the county where the personal property is situated takes priority over a judgment unrecorded in that county.

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## ARGUMENT.

### THE LIEN OF THE UNITED STATES FOR TAXES WAS PRIOR AND SUPERIOR TO ANY LIEN OF THE CREDITOR MILLER.

This case involves conflicting claims of the United States for taxes and of an individual creditor to a fund of $3,199.59 on deposit in the Healdsburg Branch of the Bank of America, National Trust & Savings Association, at Healdsburg, Sonoma County, California, to the credit of Lyle B. Everett, the debtor. Both claims exceed the fund in the bank. The District Court held that the lien of the United States for taxes was prior and superior to the lien of the creditor.

In that connection a brief review of the facts is important. The lien claimed by the creditor arises

out of an action instituted in the Superior Court for the County of Mendocino, California, in which a judgment by default was entered on March 11, 1944, after a writ of attachment had issued and was served on the Bank on January 5, 1944. On March 11, 1944, the judgment was entered on the book of judgments in the office of the County Clerk of Mendocino County, California. In this connection it should be noted that the judgment was recorded in Mendocino County whereas the fund on deposit was located in the Bank in Sonoma County, California. No execution was issued under the judgment and the judgment was never recorded in Sonoma County, California. No seizure of the fund was made by the creditor but the money remained in the Bank until the action of interpleader was filed by the Bank at which time the Bank paid the amount on deposit to the Clerk of the District Court as custodian.

The taxes were assessed by the Commissioner on March 25 and April 11, 1944, and the assessment lists were received by the Collector on March 27 and April 14, 1944. The liens of the United States were filed of record with the County Recorder of Sonoma County, California, on April 21, 1944, after notice and demand for payment had been made on the taxpayers. On April 21, 1944, the Collector of Internal Revenue served a notice of levy for the taxes assessed in the amount of $3,281.95 upon the Bank at its Healdsburg Branch, Sonoma County, California. Under these facts the District Court correctly held that the liens of the United States were rendered valid on April 21,

1944, when the Collector filed notices of lien in the offices of the County Recorder in Sonoma County, California, and served notice of levy upon the Bank at its Healdsburg Branch in Sonoma County, California, and were superior to any lien of the creditor.

Under Section 3670 of the Internal Revenue Code, *supra,* if any person liable to pay any tax refuses to pay the same after demand the amount, including interest and penalties, shall be a lien in favor of the United States upon all property and rights to property belonging to such person, and under Section 3671 of the Internal Revenue Code, *supra,* the lien arises at the time the assessment list is received by the Collector.

Under Section 3672 of the Internal Revenue Code, as amended, *supra,* the lien becomes valid as against any judgment creditor when notice is filed in the office in which the filing of such notice is authorized by the law of the state in which the property subject to the lien is situated. The laws of California provide that notices of lien for internal revenue taxes payable to the United States be filed in the office of the county recorder of the county in which the property subject to the lien is situated.[2]

In this case, therefore, the United States properly recorded its liens of record in Sonoma County. The

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[2] II Deering's General Laws of California (1937) 3850-3851:

Act 8487. *Notices of Liens for Internal Revenue Taxes.* [Stats. 1923, p. 1124.] * * *

§ 1. *Notices, etc., may be filed.* Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the county recorder of the county or counties within which the property subject to such lien is situated.

burden was then on the creditor to establish a prior lien on the fund as such and the mere fact that a judgment has been entered is not, in and of itself, the establishment of a lien on personal property. Nor does an attachment, in and of itself, create a lien or establish a priority. *MacKenzie v. United States,* 109 F. 2d 540 (C.C.A. 9th).

Under Section 674 (formerly Section 671) of the California Code of Civil Procedure,[3] a judgment becomes a lien only upon the real property owned by the judgment debtor from the time it is docketed in the county where the property is situated. *Cook v. Huntley,* 44 Cal. App. 2d 635, 112 P. 2d 889; *Lisenbee v. Lisenbee,* 42 Cal. App. 567, 569, 183 Pac. 862; *Wolfe v. Langford,* 14 Cal. App. 359, 362, 112 Pac. 203.

In *Cook v. Huntley, supra,* it was held that the lien of a judgment attaches only to real property in which the judgment debtor has a vested legal interest and not personal property. The Court said (p. 641):

> The lien of a judgment only attaches to real property in which the judgment debtor has a vested legal interest. (Code Civ. Proc., sec. 674; *People v. Irwin,* 14 Cal. 428.) It will not attach

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[3]The Code provides:

§ 674. An abstract of the judgment or decree of any court of this State, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. * * *

> to a mere equitable interest of the judgment debtor in real property (*Belieu v. Power,* 54 Cal. App. 244 [201 Pac. 620]; *Poindexter v. Los Angeles Stone Co.,* 60 Cal. App. 686 [214 Pac. 241]) nor to an estate for years. (*Summerville v. Stockton Milling Co.,* 142 Cal. 529 [76 Pac. 243].)

A judgment creates no lien on the personal property of the debtor under the laws of California. Section 674, California Code of Civil Procedure; *Bagley v. Ward,* 37 Cal. 121, 131.

In *Wolfe v. Langford, supra,* it was held that neither an attachment nor a judgment is an instrument within the meaning of Section 1107 of the Civil Code and an unrecorded deed was held to take precedence over an attachment or a judgment. The same ruling was also made in *Davis v. Perry,* 120 Cal. App. 670, 8 P. 2d 514.

In the case of an attachment on real property, the lien merges in the lien of the judgment. *Bagley v. Ward,* 37 Cal. 121, 131; *Brun v. Evans,* 197 Cal. 439, 241 Pac. 86; *Balzano v. Traeger,* 93 Cal. App. 640, 643, 270 Pac. 249. But under California law a judgment does not become a lien upon personal property even though the property is held by attachment in the action. *Balzano v. Traeger,* 93 Cal. App. 640, 643, 270 Pac. 249; *Summerville v. Stockton Milling Co.,* 142 Cal. 529, 540-541, 76 Pac. 243.

Thus the situation is entirely different in respect to personal property held by attachment. In such a case the judgment does not become a lien upon the

personal property despite the attachment but the lien of the attachment continues after judgment to allow the issue and levy of execution under the judgment and the judgment alone can be enforced against the property. That principle is clearly stated in the *Balzano* case, *supra,* where the Court said (pp. 643-644):

> The judgment does not become a lien upon personal property even though the property is held by attachment in the action (*Bagley v. Ward, supra*), but the lien of the attachment continues after judgment to preserve the lien and its priority and to allow the issue and levy of the execution under the judgment (6 Cor. Jur. 271), and the judgment alone can be enforced against the property. (Sec. 681, Code Civ. Proc.; *Pease v. Frank,* 263 Ill. 500 [105 N.E. 299].)
>
> Respondent's first contention is that section 674, so far as it relates to any lien of attachment, has application only to the lien of any attachment upon real property which merges into the judgment in the action; and, that if the legislature, in adopting the legislation, intended to include and cover the lien of any attachment upon personal property the titles of the acts adopting or amending sections 671 and 674 of the Code of Civil Procedure, would have been so worded as to embody some reference thereto.

The Court so held and concluded that Section 674 of the Code of Civil Procedure, so far as it relates to any lien of attachment, has application only to the lien of an attachment upon real property and does not relate to or effect a lien on personal property.

In the *Summerville* case, *supra,* it was held that a leasehold estate for a term of years was personal property and was not subject to the lien of a judgment upon real property. Therefore it was concluded that no lien can be acquired under a judgment until the levy of execution, or, if there be no levy, a sale under execution or at all events not prior to the notice of sale. The Court said (pp. 540-541):

> The claim of the plaintiff that no formal levy was necessary upon the growing crop nor upon the leasehold interest is, by reason of the proposition which we have just considered, necessarily untenable. It may be conceded, as was decided in *Lenhardt v. Jennings,* 119 Cal. 192; *Bagley v. Ward,* 37 Cal. 121; and *Blood v. Light,* 38 Cal. 654, that the levy of an execution is not necessary where the judgment itself constitutes a lien upon the real property which is the subject of the execution sale. But, as we have seen, the judgment in this case did not constitute a lien upon the property sold, and as there was no levy, it follows that the sale, if otherwise valid, took effect upon the day of its date, and not before, or, at all events, not before the notices of the sale were posted (see *Lenhardt v. Jennings,* 119 Cal. 192), and that the right of the plaintiff began upon one or the other of those dates, and is subsequent and subject to the right of the mortgagee. We think, therefore, that there was no lien upon the leasehold estate of Stuart in favor of the plaintiff until the sale took place or the notices were posted, which was several weeks after the execution of the mortgage to Hewlett, and consequently that, so far as that question determines his right,

> Hewlett had the superior right to the possession of the wheat in controversy, so far as that possession may be necessary to protect his lien thereon for the payment of the debts aforesaid.

See also *Lean v. Gibbons,* 146 Cal. 739, 742-743, 81 Pac. 128.

In *Dam v. Zirk,* 112 Cal. 91, 44 Pac. 331, it was pointed out that a docketed judgment is not necessarily a lien, and in *Davis v. Perry,* 120 Cal. App. 670, 8 P. 2d 514, it was held that the recording of a judgment against the grantor did not make the previously executed, but later recorded, deed subject to the judgment lien where the deed was recorded prior to any proceeding in execution or sale under the judgment. The case is of importance in showing the necessity for execution upon a judgment before the establishment of a lien is perfected.

In *Wellborn v. Wellborn,* 55 Cal. App. 2d 516, 131 P. 2d 48, it was held that where a money judgment is rendered it becomes a lien on the real property of the judgment debtor and where a judgment imposes a personal liability, as well as declares a lien, a judgment creditor may have execution on the specific property upon which the lien is declared. The Court there points out (p. 521) the distinction between the mode of executing a common law judgment for money, by the issuance of a writ of execution, and the mode of executing a decree in equity providing for a lien.

In *MacKenzie v. United States,* 109 F. 2d 540 (C.C.A. 9th), it was held that where notice of a

federal tax lien was filed, after an attachment was levied by a creditor against the taxpayer's bank deposit but before the attaching creditor obtained a judgment, the Government's tax lien took priority over the attachment.

In *United States v. Spreckels,* 50 F. Supp. 789 (N.D. Cal.), it was held that a federal tax lien, recorded in the county where the taxpayer's realty was situated prior to the time the real estate was executed upon by taxpayer's judgment creditor, was superior to any judgment lien. It was also held that where the federal tax lien was not filed in the county where the taxpayer resided, the situs of taxpayer's intangible personal property, rights previously acquired by a judgment creditor to taxpayer's intangible personal property was superior to the tax lien. In that case the Collector filed notice of tax lien in August, 1934. The United States filed suit on December 30, 1935. The defendant bank asserted an interest adverse to the claim of the Government under a judgment against the taxpayer obtained June 3, 1936, and recorded in October, 1936, and November, 1936. The bank had execution issued upon the judgment and obtained title to various properties belonging to the taxpayer on which the Government claimed it had a prior lien. The Court said (pp. 791-792):

> The lien of the Government was properly recorded in Kings county and attached to the real property located there prior to the time it was executed upon by the bank. The balance of the property to which the bank makes claim under its

judgment (with the exception of certain land in Tulare county where no lien was recorded by the Government) consists of intangible personal property. Following the general rule that the situs of such property is the domicile of the owner, the Government should have recorded its lien in San Mateo county where the taxpayer resided. This was not done until 1937, after the bank had executed on such property under its judgment.

I conclude that the rights of the bank should prevail as to all property acquired under its judgment except the real property located in Kings county, upon which the United States had a valid and existing lien as against all the world, at the time execution was issued.

The above case establishes two fundamental principles. First, that to perfect a lien on personal property there must be a recording in the county where the property is situated, and second, that, under a judgment, there must be an execution upon personal property prior to the perfection of a lien by the United States. Neither of these steps were taken by the creditor claimant in the instant case. The property was situated in Sonoma County. The judgment was entered in Mendocino County and was not recorded in Sonoma County. Furthermore, no execution was issued on the fund held by the Bank after the creditor obtained the judgment and before the lien of the United States attached.

Considering the federal statute, Section 3672 of the Internal Revenue Code, as amended, it provides that

the lien of the United States shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice has been filed as authorized by the state where the property is situated. Considering the classes of persons mentioned in the statute it will be seen that mortgagees, pledgees and purchasers have possession of a property interest, the *res.* But, as shown above, a judgment creditor in California has no specific lien on personal property and, under the facts of the instant case, the creditor was not in possession of any fund or *res.* An intention by Congress to prefer an unsecured judgment creditor holding a money judgment over a secured one, the United States, can hardly be imputed to that legislative body.

The lien of the United States on the real and personal property of a taxpayer arises when the assessment list is received by the Collector under Section 3671 of the Internal Revenue Code. Where the filing of a notice of lien is required by state law the lien of the United States relates back to the date of receipt of the list by the Collector when the notice is filed. *United States v. Rosenfield,* 26 F. Supp. 433, 435-436 (E.D. Mich.).

A creditor who obtains a money judgment in an inferior court of some far-distant state should certainly not take precedence over a lien of the United States for taxes prior to the recording of the judgment in the County of California where the personal property is situated. The same rule is equally applicable as between money judgments obtained in the

various counties of the State of California. The federal statute should not be construed as giving priority to a creditor merely because he has secured a judgment in some other political subdivision where the United States has recorded its lien in the county where the personal property is situated prior to the establishment of a judgment lien against that personal property by some other creditor. The attachment lien, so called, is not really a lien, as pointed out above, but is merely notice of an *inchoate* lien. Cf. *New York v. Maclay,* 288 U.S. 290; *United States v. Texas,* 314 U. S. 480; *United States v. Waddill,* 323 U.S. 353. The lien here asserted by the appellant was never made specific prior to the filing by the United States of its lien for taxes.

The cases relied upon by the appellant are not controlling.

In the case of *United States v. Record Pub. Co.,* 60 F. Supp. 194 (N.D. Cal.) (Br. 9), the Court held that where a judgment creditor had levied on his judgment it was superior to the lien of the United States filed subsequently of record in the county.

In *Underwood v. United States,* 118 F. 2d 760 (C.C.A. 5th), affirming 37 F. Supp. 824 (E.D. Tex.) (Br. 10), the Court held that a federal tax lien was superior to a prior, but unrecorded, deed of trust and mortgage.

*Manufacturers Trust Co. v. Sobel,* 175 Misc. 1067, 26 N.Y.S. 2d 145 (Br. 8), was decided by the City Court of New York for New York County and we

believe the decision to be wrong in principle. However, it should be noted in that case that judgments had been obtained by the creditor, supplementary proceedings had been commenced by the service of a subpoena, with restraining clauses, upon the third party, and a receiver had been appointed before the lien of the United States had been perfected or attached to any property of the debtor. Under New York law the equitable lien obtained by a judgment creditor through service upon the third party of a subpoena containing a restraining provision is *inchoate* until perfected by the appointment of a receiver or the obtaining of an order directing the third party to pay over. *McCorkle v. Herrman,* 117 N.Y. 297, 300; *Matter of City of New York,* 165 Misc. 309, 311-313. See also *In re Vantine's Retail Stores,* 43 F. 2d 870 (S.D. N.Y.), where it was held that a third party order against a bank in supplementary proceedings did not give a judgment creditor a lien on a deposit where no receiver was appointed.

*Chalmers & Williams v. Surprise, Rec.,* 70 Ind. App. 646, 123 N.E. 841 (Br. 9), involved the construction and application of the laws of Illinois to a contract for the conditional sale of machinery to a company which later became insolvent and a receiver was appointed. The seller claimed priority over other general creditors of the insolvent company. The Court merely held that under the law of Illinois the general creditors of an insolvent company are not execution creditors on the theory that the seizure by a receiver of machinery sold under a conditional sale contract

was in the nature of an equitable levy by the Court and fixed a lien thereon in favor of the general creditors.

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## CONCLUSION.

The decision of the District Court awarding priority to the Government's lien for taxes is correct and should be affirmed.

Dated, San Francisco,
October 8, 1947.

Respectfully submitted,

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